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12 KELLYTOY (USA), INC., a California
13 corporation; and KELLYTOY
WORLDWIDE, INC., a California
corporation;

Plaintiffs,

vs.

16 GOFFA INTERNATIONAL CORP., a
17 New York corporation; and DOES 1
through 10, inclusive.

18 Defendants.

Case No.

COMPLAINT FOR:

- 1. FEDERAL TRADEMARK INFRINGEMENT, FALSE DESIGNATION OF ORIGIN AND FALSE DESCRIPTION (15 U.S.C. § 1125);**
- 2. FEDERAL COPYRIGHT INFRINGEMENT (17 U.S.C. § 501);**
- 3. COMMON LAW TRADEMARK INFRINGEMENT**
- 4. CALIFORNIA COMMON LAW UNFAIR COMPETITION; AND**
- 5. CALIFORNIA STATUTORY UNFAIR COMPETITION**

DEMAND FOR JURY TRIAL

1 Plaintiffs KELLYTOY (USA), INC., a California Corporation and
 2 KELLYTOY WORLDWIDE, INC., a California Corporation (collectively,
 3 “Kellytoy”) bring this action against defendant GOFFA INTERNATIONAL
 4 CORP., a New York Corporation (“Goffa”), and DOES 1-10 (collectively,
 5 “Defendants”) for injunctive relief and damages under the laws of the United States
 6 and the State of California as follows:

7 **JURISDICTION AND VENUE**

8 1. This action arises under the copyright laws of the United States, 17
 9 U.S.C. § 101 *et seq.*, the trademark laws of the United States, 15 U.S.C. § 1125(a),
 10 and under the statutory and common law of trademark/tradedress infringement and
 11 unfair competition.

12 2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1338, and 1367,
 13 and 15 U.S.C. §§ 1116, 1117, 1121, and 1125.

14 3. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391 and
 15 1400(a).

16 4. This Court has personal jurisdiction over Defendants, as Defendants are
 17 doing business in California and this District and are subject to the jurisdiction of
 18 this Court. In addition, Defendant Goffa knowingly infringed on Kellytoy’s
 19 copyrights and trade dress, knowing that Kellytoy is a California resident, and
 20 thereby purposefully directed its activities towards California.

21 **NATURE OF THE ACTION**

22 5. This is an action for copyright infringement under the Copyright Act,
 23 17 U.S.C. §§ 101, *et seq.*; and trade dress infringement, trademark infringement,
 24 unfair competition and false designation of origin under the Lanham Act, 15 U.S.C.
 25 § 1125(a), California Bus. & Prof. Code § 17200, *et seq.*, and the common law.

26 6. Kellytoy’s SQUISHMALLOW branded plush toys (“Squishmallows”)
 27 – as more fully depicted in Exhibit 1 hereto – are one of the world’s hottest plush
 28 toy lines. Kellytoy’s Squishmallows feature a highly distinctive and widely

1 recognized trade dress, which Kellytoy pioneered and created. Kellytoy markets its
2 Squishmallows on social media, at tradeshows, through Squishmallows.com,
3 amazon.com, Walmart.com, walgreens.com and target.com, and on Kellytoy's
4 website, depicting images of its proprietary Squishmallows line of plush toys.

5 7. Defendants are intellectual property pirates. Now that Kellytoy's
6 Squishmallows have exploded in popularity, Kellytoy discovered that Defendants
7 have begun offering to sell and selling knock-off products that infringe Kellytoy's
8 trade dress and copyrighted designs in its Squishmallows to third-party customers,
9 including at trade shows. Kellytoy sent a letter to defendant Goffa demanding that it
10 cease and desist from further selling the knock-off products, but to no avail.

11 8. Accordingly, to prevent and remediate the rampant consumer confusion
12 and misappropriation of Kellytoy's copyrighted designs in its Squishmallows
13 resulting from Defendants' unauthorized promotion and sale of the Infringing Plush,
14 and to compensate Kellytoy for its injuries, Kellytoy seeks immediate and
15 permanent injunctive relief, compensatory damages, disgorgement of Defendants'
16 profits, statutory damages, punitive damages, Kellytoy's reasonable attorneys' fees
17 and expenses, a product recall, and corrective advertising sufficient to address
18 Defendants' wrongdoing.

THE PARTIES

20 9. Kellytoy (USA), Inc. is a California corporation with its principal place
21 of business located in Vernon, California.

22 10. Kellytoy Worldwide, Inc. is a California corporation with its principal
23 place of business located in Vernon, California.

24 11. On information belief, defendant Goffa International Corp. (“Goffa”) is
25 a New York corporation with its principal place of business in East Rutherford, New
26 Jersey.

27 12. Goffa is in the business of manufacturing and selling children's toys
28 including, among other things, plush toys under the MUSHIES trademark.

1 13. The true names and capacities of defendants sued herein as DOES 1-
2 10, inclusive, are unknown to Kellytoy, who therefore sues said defendants by such
3 fictitious names. Kellytoy will amend this Complaint to allege their true names and
4 capacities when the same are ascertained.

5 14. Upon information and belief, at all relevant times mentioned in this
6 Complaint, Defendants, and each of them, were acting in concert and active
7 participation with each other in committing the wrongful acts alleged herein, and
8 were the agents of each other and were acting within the scope and authority of that
9 agency and with the knowledge, consent and permission of one another.

BACKGROUND FACTS

Kellytoy and Its Protected Intellectual Property Rights

12 15. Kellytoy is engaged in the business of creating, manufacturing,
13 distributing and selling unique plush toys, including, without limitation, its
14 Squishmallows under the SQUISHMALLOW brand.

15 16. Kellytoy has been in business for nearly 40 years and in that time has
16 developed a reputation for producing high quality, unique, creative and innovative
17 plush toys that are highly prized in the industry.

18 17. Kellytoy exerts great efforts to promote and preserve its image identity
19 and the image and identity of its high quality plush toys, including by creating
20 distinctive designs and marks for use on its products and seeking U.S. trademark
21 and copyright registrations for such designs and marks, including those at issue in
22 this Complaint.

23 18. In 2016, Kellytoy conceived of and created its Squishmallows line of
24 plush toy designs, marketed in connection with the SQUISHMALLOW trademark,
25 that share common, unique features that distinguish them from the goods of others.
26 These designs are wholly original Kellytoy and comprise copyrightable subject
27 matter under the laws of the United States.

28 19. Kellytoy has been and is the sole owner of all right, title and interest in

1 and to the copyrights in the individual “characters” in the Squishmallows line and
2 the distinguishing, unique, and recognizable features that are common across the
3 Squishmallows line. From 2016 to the present, Kellytoy has expended large sums of
4 money in developing, advertising and promoting these product designs through the
5 United States. In fact, Kellytoy is spending approximately \$50,000 per month in
6 direct to consumer and business-to-business advertising.

7 20. Kellytoy sells a broad range of Squishmallows that feature the
8 brand’s iconic trade dress, which is not easily reduced to writing, but includes,
9 without limitation: (1) substantially oval shaped plush animals, with substantially
10 flat bottoms, (2) Japanese-inspired minimalist and whimsical facial features, (3) a
11 velvety velour-like-plush, Spandex exterior, and (4) stuffed with a “Memory Foam”
12 like polyester stuffing – as more fully depicted in Exhibit 1 hereto – features
13 common to Kellytoy’s line of Squishmallows (collectively the “Squishmallow Trade
14 Dress”). The plush designs depicted in Exhibit 2 – a subset of Kellytoy’s line of
15 Squishmallows – comprise some of Kellytoy’s most popular Squishmallows, which
16 were created by or assigned to Kellytoy (the “Squishmallow Designs”). As set forth
17 in greater detail below, these Squishmallow Designs are the subject of Copyright
18 Registrations issued by the United States Copyright Office, pursuant to 17 U.S.C.
19 §101 *et seq.*

20 21. Continuously and without interruption, beginning in 2016, Kellytoy has
21 expended a great deal of time, effort, and money in the promotion of its
22 Squishmallows. Due to Kellytoy’s unique design, extensive marketing efforts,
23 media coverage, and market penetration, the Squishmallow Trade Dress has
24 acquired distinctiveness in the marketplace when applied to plush toys. Indeed,
25 because of Kellytoy’s extensive promotional activities and widespread display of its
26 Squishmallows directed to the public, and a consequence of Kellytoy’s fair and
27 honorable dealings with its customers, the relevant consuming public has come to
28 recognize and associate plush toys bearing the Squishmallow Trade Dress as high

1 quality goods connected with or offered by Kellytoy. Squishmallow Trade Dress
2 has valuable goodwill and consumer recognition associated with it and has come to
3 symbolize the valuable goodwill and reputation of Kellytoy.

4 22. In addition to being original and inherently distinctive, the
5 Squishmallow Trade Dress is widely recognized by consumers. A simple Internet
6 search using the Google search engine yields 32,200 "hits" for the search term
7 "Squishmallows."

8 23. Kellytoy sells its Squishmallows on its website <squishmallows.com>
9 featuring dozens of copyright-protected photographs of its plush toys and models
10 holding its Squishmallows. Copies of the homepage and other representative pages
11 from <squishmallows.com> are attached as Exhibit 3.

12 24. Further adding to their recognizability and secondary meaning in the
13 marketplace, Squishmallows have been featured in numerous magazines, press
14 articles, reviews, and videos, as set forth in greater detail in Exhibit 4 hereto,
15 including many mainstream media outlets such as the *Washington Post*, the *Chicago*
16 *Tribune*, the *Daily Harold*, *Okay! Magazine*, among others. By way of example
17 only, Squishmallows have been also recognized by The *Washington Post* and
18 *Consumer Reports* on their 2017 Holiday Gift Guides; *LA Parent* recognized
19 Squishmallows in its October 2017 issue, under the "Products We Love" section;
20 and, as depicted below, *OK! Magazine* featured Squishmallows in its August 21,
21 2017 issue, stating "Cuddly as they are cute, they make great couch pals, pillows
22 and bedtime buddies in any home. Collect the whole squad! squishmallows.com."

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25. Kellytoy's Squishmallows have also been featured in the October 2017 issues of *L.A. Parent Magazine*, *City Parent Magazine*, and *San Diego Family Magazine* and included in the 2017 gift guides for various publications, including in *The Washington Post*, *The Houston Chronicle*, and *L.A. Parent*.

26. Kellytoy's Kellytoy's Squishmallows have also been the subject of numerous industry awards and product recommendation lists, including by the National Parenting Product Awards, Parents' Choice, and TTPM, as more fully set out in Exhibit 4. In fact, Kellytoy's Squishmallows were named by *Toy Insider* as one of the "Top Holiday Toys," made the cover the September/October 2017 *Toy Book Magazine*, and have been featured in numerous other trade magazines, such as, *Teddy Bear and Friends Magazine* and *Animal Tales Magazine*.

27. Kellytoy's Squishmallows have also been the subject of extensive marketing campaigns, including email campaigns, social media posts, and direct to consumer advertising. Kellytoy's Squishmallows currently have more than 13,300 Instagram followers, more than 19,000 Facebook followers – more than many

1 longer-existing and well-known plush brands. To its followers, Kellytoy regularly
2 publishes photographs of its Squishmallows. Many of these followers, in turn, share
3 these posts with their friends and social media followers. A copy of Squishmallows
4 Instagram page is attached as Exhibit 5.

5 28. In addition, hundreds of well-known YouTube influencers and vloggers
6 have shared and posted images and videos of themselves holding plush toys in
7 Kellytoy's line of Squishmallows products. Tens of thousands of consumers have
8 done the same through numerous media platforms, including, Facebook, Instagram,
9 Pinterest and YouTube. These posts have generated millions of "likes" and "shares."

10 29. Fans have been extremely engaged on social media, including
11 Facebook and Instagram, demonstrating their awareness and affection for Kellytoy's
12 Squishmallows, with the average Squishmallows post likes on Instagram hovering
13 over 1000+ per post and 45-100 average comments per post.

14 30. Kellytoy's Squishmallow website traffic has grown exponentially since
15 its launch in 2017 to an average of 4,313 visits per day.

16 31. Kellytoy's Squishmallows are listed amongst the leading global brands
17 and toys such as Hatchimals, Hasbro, RB, Hot Wheels, NERF, and Spin Master by
18 several industry publications.

19 32. As a direct result of Kellytoy's efforts at promoting and building its
20 brand, Kellytoy's Squishmallows line has exploded in popularity, creating
21 substantial demand for and interest in Squishmallows, and generating enormous
22 goodwill in the Squishmallows brand and the Squishmallows Trade Dress in the
23 United States and around the world. In fact, Kellytoy's Squishmallows are sold
24 through hundreds of retailers including some of the largest retailers in the country,
25 including, approximately 1000 Costco stores, 5,500 Walmart stores, 8,500
26 Walgreens stores, 4,000 Kroger supermarkets and Fred Meyer stores, 2000 Target
27 stores, 900 Party City stores, amongst other outfits such as Dave & Busters, Knotts
28 Berry Farms and numerous others.

33. Since the summer of 2017, Kellytoy has sold in excess of 4 million
2 units of Squishmallows. Kellytoy's Squishmallows products embodying the
3 Squishmallows Trade Dress have yielded tens of millions of dollars of sales in the
4 U.S. over the past year.

5 34. In fact, Kellytoy's Squishmallows sold out through Walgreens.com
6 during their Gift of the Week promotion in early November 2017, as well as
7 exceeding all sales goals for the campaign, both online and in stores.

8 35. Because of Squishmallows' massive success and popularity, consumers
9 have come to associate Kellytoy's high-quality Squishmallows plush toys with the
10 Squishmallows Trade Dress and, conversely, have come to recognize the
11 Squishmallow Trade Dress as a designation of source.

Defendants' Unlawful Conduct

13 36. At the outset, none of the defendants to this action is licensed or
14 otherwise authorized by Kellytoy to market or distribute products bearing Kellytoy's
15 Squishmallow Designs and/or Squishmallow Trade Dress.

16 37. Upon information and belief, since approximately February 2018,
17 notably well after Kellytoy established its reputation in its Squishmallow Trade
18 Dress, Defendants have offered for sale and sold various plush toys bearing
19 substantially similar copies of Kellytoy's Squishmallow Designs and Squishmallow
20 Trade Dress (hereinafter referred to as "Infringing Plush") through marketing pieces,
21 at trade shows, and other means. Photographs of Goffa's February 2018 booth at
22 the New Jersey Amusement Association Show, depicting examples of Defendants'
23 Infringing Plush are collectively attached hereto as Exhibit 6.

24 38. Upon information and belief, Defendants have caused the Infringing
25 Plush to enter interstate commerce and/or to be transported or used in interstate
26 commerce, and Kellytoy's Squishmallows plush and Defendants' Infringing Plush
27 are sold in the same channels of trade.

28 || 39. Upon information and belief, Defendants have sold and continue to sell

1 the imported Infringing Plush at prices that were/are relatively lower than the prices
 2 charged by Kellytoy for its Squishmallows plush. Kellytoy is informed and believes
 3 that Defendants are able to undercut Kellytoy's sales prices because Defendants
 4 have, rather than investing in creating its own designs and identity, elected to copy
 5 Kellytoy's proprietary Squishmallow Designs and Squishmallow Trade Dress and
 6 because Defendants' Infringing Plush are of inferior quality as compared to
 7 Kellytoy's SQUISHMALLOW branded plush.

8 40. On February 20 2018, Kellytoy observed Goffa displaying the
 9 Infringing Plush at the New Jersey Amusement Association trade show, also
 10 attended by Kellytoy. On February 27, 2018, Kellytoy notified Goffa that Kellytoy
 11 owns the rights in and to the Squishmallow Designs and Squishmallow Trade Dress,
 12 and requested that Goffa stop offering for sale and selling the Infringing Plush.
 13 Goffa, however, ignored Kellytoy's attempt to informally resolve the dispute.

14 41. Kellytoy is informed and believes that Defendants, without Kellytoy's
 15 consent or permission, continue to sell, advertise, promote, display, and distribute,
 16 toys bearing Squishmallow Designs and Squishmallow Trade Dress.

17 42. The activities of Defendants in copying, distributing, advertising,
 18 selling, offering for sale and otherwise using the Squishmallow Trade Dress
 19 embodied in the Infringing Plush – including by wholesalingly copying the shape and
 20 look – constitute false designation of origin regarding sponsorship of those plush
 21 toys and falsely represent to the public that Defendants' plush toys originate from
 22 Kellytoy, and/or that Defendants' plush toys have been sponsored, approved or
 23 licensed by Kellytoy, or in some way affiliated or connected with Kellytoy. Such
 24 activities of Defendants are likely to confuse, mislead, and deceive Defendants'
 25 customers, purchasers, and members of the public as to the origin of the toys bearing
 26 the Squishmallow Trade Dress, or to cause such persons to believe that Defendants'
 27 Infringing Plush and/or Defendants have been sponsored, approved, authorized, or
 28 licensed by Kellytoy or in some way affiliated or connected with Kellytoy, all in

violation of 15 U.S.C. §1125(a).

2 43. Upon information and belief, the activities of Defendants were done
3 willfully with full knowledge of the falsity of such designations of origin and false
4 descriptions or representations, with the intent to trade on the enormous goodwill
5 Kellytoy has earned in its Squishmallows, and with the intent to cause confusion,
6 and to mislead and deceive the purchasing public into believing that the products
7 Defendants sell are directly sponsored by, authorized, by, associated with, or
8 originate from Kellytoy.

9 44. Defendants, by their unauthorized copying and use of Kellytoy's
10 Squishmallow Designs and Squishmallow Trade Dress, have and are engaging in
11 acts of copyright infringement, unfair competition, unlawful appropriation, unjust
12 enrichment, wrongful deception of the purchasing public, and unlawful trading on
13 Kellytoy's good will and the public acceptance of Kellytoy's original works.
14 Defendants have damaged the reputation, business and good will of Kellytoy
15 nationally and in this judicial district.

16 45. Upon information and belief, Defendants are currently engaged in such
17 infringing activities and unless enjoined by the Court will continue such infringing
18 activities.

19 46. Kellytoy has no adequate remedy at law. Thus said activities of
20 Defendants have caused and, if not enjoined, will continue to cause irreparable,
21 immediate and impending harm and damage to Kellytoy's business, and to the
22 business, business reputation and good will of Kellytoy.

FIRST CAUSE OF ACTION

(Trademark Infringement, False Designation of Origin and False Description --

15 U.S.C. §1125)

(Against All Defendants)

27 47. Kellytoy repeats and realleges each of the allegations above as if fully
28 set forth herein.

1 48. The Squishmallow Trade Dress is non-functional and highly
2 distinctive, and has become associated in the public mind with plush toy products of
3 the highest quality and reputation finding their source in Kellytoy.

4 49. Kellytoy owns all right, title and interest in and to the Squishmallow
5 Trade Dress.

6 50. Without Kellytoy's authorization or consent, and having knowledge of
7 Kellytoy's prior rights in the Squishmallow Trade Dress, Defendants have designed,
8 manufactured, distributed, advertised, offered for sale and sold replicas of the
9 Squishmallow Trade Dress to the consuming public in direct competition with
10 Kellytoy, in or affecting interstate commerce.

11 51. The Infringing Plush designs are confusingly similar to the
12 Squishmallow Trade Dress. Defendants' use of the Squishmallow Trade Dress has
13 caused and, unless enjoined by this Court, will continue to cause a likelihood of
14 confusion and deception of members of the public and, additionally, injury to
15 Kellytoy's goodwill and reputation as symbolized by the Squishmallow Trade
16 Dress.

17 52. Defendants' use of the Squishmallow Trade Dress thus constitutes trade
18 dress infringement, false designation of origin and unfair competition in violation of
19 15 U.S.C. § 1125(a).

20 53. As a direct and proximate result of Defendants' unlawful conduct,
21 Defendants have misappropriated Kellytoy's rights in the Squishmallow Trade
22 Dress, as well as the goodwill associated therewith, and have diverted sales and
23 profits from Kellytoy to Defendants. Thus, as a direct and proximate result of
24 Defendants' acts of willful infringement, Kellytoy has suffered damage to its
25 valuable brand and reputation, and other damages in an amount to be proven at trial,
26 including Defendants' profits and Kellytoy's lost profits.

27 54. Defendants' actions described above have caused and will continue to
28 cause irreparable damage to Kellytoy, unless Defendants are restrained by this

1 Court. Kellytoy has no adequate remedy at law with regard to Defendants'
2 infringing conduct. Accordingly, Kellytoy is entitled to a preliminary and
3 permanent injunction, pursuant to 15 U.S.C. § 1116, restraining and enjoining
4 Defendants' and their agents, servants, and employees, and all persons acting
5 thereunder, in concert with, or on their behalf, from using Kellytoy's Squishmallow
6 Trade Dress, or any colorable imitation or variation thereof, in connection with the
7 sale and/or marketing of any products.

8 55. Defendants' aforesaid acts are exceptional within the meaning of 15
9 U.S.C § 1117.

10 **SECOND CAUSE OF ACTION**

11 **(Federal Copyright Infringement -- 17 U.S.C. §501)**

12 (Against all Defendants)

13 56. Kellytoy repeats and realleges each and every allegation of paragraphs
14 1 through 46 above as though fully set forth herein.

15 57. Kellytoy owns a valid copyright in each of the Squishmallow Designs.
16 The Squishmallow Designs are original, decorative, and non-functional. After
17 having had access to Kellytoy's Squishmallow Designs, Defendants, without
18 authorization from Kellytoy, have designed, manufactured, distributed, advertised,
19 offered for sale and sold the Infringing Plush bearing designs that Defendants copied
20 from the Squishmallow Designs.

21 58. All of the Squishmallow Designs were originally created by Kellytoy
22 or were assigned to and are owned by Kellytoy.

23 59. The Squishmallow Designs comprise original works of authorship that
24 may be copyrighted under United States law. In fact, Kellytoy has complied with
25 requirements of Title 17 of the United States Code with respect to the registration of
26 Kellytoy's dog, monkey, penguin and sloth Squishmallow Designs depicted in
27 Exhibit 2, as evidenced by United States Copyright Registration Nos.
28 VA0002096023, VA0002096022, VA0002093068, and VA0002093072,

1 respectively, entitling Kellytoy to the exclusive rights and privileges in and to the
2 above-referenced copyrights. These copyright registrations are valid and subsisting.

3 60. Upon information and belief, before and after the date of
4 registration/application of the copyrighted Squishmallow Designs and continuing to
5 date, Defendants have imitated, displayed, reproduced, distributed, and creating
6 derivative works from the subject matter embodied in the Squishmallow Designs in
7 connection with Defendants' manufacture, promotion, and solicitation and
8 acceptance of orders for the sale of Defendants' sloth, penguin, monkey and dog
9 designs depicted in Exhibit 7.

10 61. Defendants' acts are in violation of the exclusive rights of the copyright
11 holder to reproduce, distribute, display, and create derivative works from the
12 copyrighted Squishmallow Designs, as articulated in 17 U.S.C. § 106. Defendants
13 have thereby infringed Kellytoy's copyrights in the Squishmallow Designs.

14 62. Such activities and conduct has caused Kellytoy injury for which it is
15 entitled to recover under 17 U.S.C. § 504.

16 63. On information and belief, Defendants' infringing acts were committed
17 with knowledge or in reckless disregard of Kellytoy's exclusive rights in the
18 Squishmallow Designs.

19 64. On information and belief, as a result of Defendants' copyright
20 infringement, they have made substantial profits and gains to which they are not
21 entitled to retain.

22 65. As a direct and proximate result of Defendants' unlawful conduct,
23 Defendants have caused and will continue to cause irreparable injury to Kellytoy,
24 for which Kellytoy has no adequate remedy at law. Unless Defendants are
25 restrained by this Court from continuing their imitation, copying, display,
26 distribution, reproduction and creation of derivative works from the works
27 embodied in the copyrighted Squishmallow Designs, these injuries will continue to
28 occur. Accordingly, Kellytoy is entitled to preliminary and permanent injunctions

1 restraining Defendants' infringing conduct, pursuant to 17 U.S.C. § 502.

2 **THIRD CAUSE OF ACTION**
3 **(Common Law Trademark Infringement)**

4 (Against all Defendants)

5 66. Kellytoy repeats and re-alleges each and every allegation of paragraphs
6 1 through 53 as though fully set forth herein.

7 67. Defendants have violated Kellytoy's exclusive common law rights in
8 the Squishmallow Trade Dress.

9 68. Kellytoy has continuously used its Squishmallow Trade Dress to
10 identify its goods in California and elsewhere, and to distinguish them from goods
11 of a different origin. As such, Kellytoy has common law rights to the Squishmallow
12 Trade Dress.

13 69. Defendants' acts described above constitute trade mark infringement
14 under the common laws of the United States, including California.

15 **FOURTH CAUSE OF ACTION**
16 **(California Common Law Unfair Competition)**

17 (Against all Defendants)

18 70. Kellytoy repeats and re-alleges each and every allegation of paragraphs
19 1 through 53 as though fully set forth herein.

20 71. This claim arises under the common law of the State of California
21 relating to unfair competition.

22 72. Defendants' Infringing Plush incorporate matter constituting
23 reproduction, copies and colorable imitation of Kellytoy's Squishmallow Trade
24 Dress. Defendants' unauthorized use of Kellytoy's Squishmallow Trade Dress
25 constitutes unfair competition, and is likely to cause confusion and mistake in the
26 minds of the trade and the purchasing public as to the source of the parties' products
27 and to cause purchasers to believe Defendants' products are authentic products of
28 Kellytoy when in fact they are not.

1 73. Upon information and belief, Defendants have intentionally
2 appropriated Kellytoy's Squishmallow Trade Dress with the intent of causing
3 confusion, mistake, and deception as to the source of their goods and with the intent
4 of palming off their goods as those of Kellytoy and to place others in the position to
5 palm off their goods as those of Kellytoy. Defendants have thus committed unfair
6 competition under the common law of the State of California.

7 74. By their actions in infringing Kellytoy's Squishmallow Trade Dress,
8 Defendants are improperly trading upon the reputation and good will of Kellytoy
9 and are impairing Kellytoy's valuable rights in its Squishmallow Trade Dress.

10 75. Upon information and belief, said activities of Defendants alleged
11 herein were and are willful and intentional acts of unfair competition.

12 76. Kellytoy has no adequate remedy at law. Thus said activities of
13 Defendants have caused, if not enjoined, will continue to cause irreparable harm and
14 damage to the rights of Kellytoy in its Squishmallow Trade Dress and to its business
15 reputation and good will.

16 77. Upon information and belief, Defendants have engaged in their
17 unlawful conduct alleged herein intentionally, maliciously, fraudulently and
18 oppressively entitling Kellytoy to punitive damages in an amount to be determined
19 at trial.

FIFTH CAUSE OF ACTION

**(California Statutory Unfair Competition –
California Bus. & Prof. Code § 17200, *et seq.*)**

(Against all Defendants)

24 78. Kellytoy repeats and re-alleges each and every allegation of paragraphs
25 1 through 55, 67 through 69, and 71 through 77 as though fully set forth herein.

26 79. By reason of the foregoing, Defendants have been, and are, engaged in
27 "unlawful, unfair or fraudulent business practices" in violation of California
28 Business and Professional Code Section 17200 et seq.

1 80. Said activities of Defendants have caused, if not enjoined, and will
2 continue to cause irreparable harm and damage to the rights of Kellytoy in its
3 Squishmallow Trade Dress and to its business reputation and good will. Kellytoy
4 has no adequate remedy at law for these wrongs and injuries. The damage to
5 Kellytoy includes harm to its goodwill and reputation in the marketplace that money
6 cannot compensate. Accordingly, Kellytoy is entitled to a preliminary and
7 permanent injunction restraining and enjoining Defendants' and their agents,
8 servants, and employees, and all persons acting thereunder, in concert with, or on
9 their behalf, from using Kellytoy's Squishmallow Trade Dress, or any colorable
10 imitation or variation thereof, in connection with the sale and/or marketing of any
11 products. Kellytoy is further entitled to recover its costs and attorneys' fees incurred
12 in bringing and prosecuting this action.

13

14

PRAYER FOR RELIEF

15 WHEREFORE, Kellytoy prays for judgment against Defendants as follows:

16 1. That Defendants, their officers, members, directors, agents, servants,
17 employees, successors, licensees, representatives, successors, assigns, and all
18 persons acting in concert or participation with them, be permanently enjoined and
19 restrained from:

- 20 (i) Manufacturing, importing, distributing, advertising, offering to
21 sell or selling the Infringing Plush or any colorable imitations of
22 the Squishmallow Designs and/or Squishmallow Trade Dress;
- 23 (ii) Using the Squishmallow Trade Dress or any confusingly
24 similar trade dress on plush or other toys;
- 25 (iii) Using the Squishmallow Trade Dress, or any confusingly
26 similar mark, in connection with the advertisement, offer to sell
27 or sale of any toy products;
- 28 (iv) Using any false designation of origin, or representing or

1 suggesting directly or by implication that Defendants, or any
2 brands created by Defendants, or their toys, are affiliated with,
3 associated with, authorized by, or otherwise connected to
4 Kellytoy, or that Defendants are authorized by Kellytoy to use
5 the Squishmallow Trade Dress or Squishmallow Designs;
6 (v) Copying, distributing, displaying or making derivative works of
7 the Squishmallow Designs;
8 (vi) Engaging in any other activity constituting unfair competition
9 with Kellytoy, or constituting infringement of the
10 Squishmallow Trade Dress or Squishmallow Designs; and
11 (vii) Assisting, aiding, or abetting any other person or business entity
12 in engaging or performing any of the activities referred to in
13 subparagraphs (i) through (vi) above, or effecting any
14 assignments or transfers, forming new entities or associations,
15 or utilizing any other device for the purpose of circumventing
16 or otherwise avoiding the prohibitions set forth in
17 subparagraphs (i) through (vi) above.

18 2. That Defendants be directed to file with the Court and serve on
19 Kellytoy, within thirty (30) days after entry of a final injunction, a report in writing
20 under oath setting forth in detail the manner and form in which Defendants have
21 complied with the injunction.

22 3. That the Court direct any third parties providing services to
23 Defendants in connection with any infringing and/or enjoined conduct, including
24 social media platforms (*e.g.*, Instagram, Facebook, Twitter), online marketplaces
25 (*e.g.*, Alibaba, eBay, Etsy, AliExpress, Amazon, Taobao), online payment
26 providers, including credit card companies (*e.g.*, PayPal, Visa) and other service
27 providers (*e.g.*, Google, GoDaddy, LiveChat, Shopify) to cease providing services
28 to Defendants in connection with the offer for sale and sale of the Infringing Plush

1 or any other products using or embodying the Squishmallow Trade Dress or
2 Squishmallow Designs.

3 4. That Defendants be required to pay Kellytoy such damages as it has
4 sustained as a consequence of Defendants' infringement of the of the Squishmallow
5 Trade Dress and trebling of those damages under 15 U.S.C. § 1117;

6 5. Adjudge that each of the Defendants, by its unauthorized use of
7 Kellytoy's the Squishmallow Trade Dress for plush toys, and such other acts as it
8 may have undertaken relating to the mark, have violated Kellytoy's rights under 15
9 U.S.C. § 1125(a), under California state law (including, without limitation, Cal. Bus.
10 & Prof. Code § 17200 *et seq.*), under common law, and that they have done so
11 willfully and for the purpose of violating Kellytoy's rights and damaging Kellytoy's
12 goodwill and reputation in the Squishmallow Trade Dress;

13 6. Direct Defendants to provide Kellytoy with an identification in writing
14 of any and all entities that are presently using the Squishmallow Trade Dress in the
15 United States on Defendants' behalf and inform them that they must immediately
16 cease such use;

17 7. Direct Defendants to immediately recall any and all merchandise
18 previously provided to any United States entity under the Squishmallow Trade
19 Dress or Squishmallow Designs;

20 8. Enter an order, pursuant to 15 U.S.C § 1118, directing Defendants to
21 deliver for destruction all products, brochures, marketing materials, decals, stickers,
22 signs, prints, packages, receptacles, wrappers, boxes, and advertisements in their
23 possession or under their control, bearing any unauthorized copy of any of the
24 Squishmallow Trade Dress, or any simulation, reproduction, counterfeit, copy,
25 confusingly similar likeness, or colorable imitation thereof, and all plates, molds,
26 matrices, programs and other means of making same;

27 9. Enter an order, pursuant to 17 U.S.C. § 503(a), impounding all of
28 Defendants' products that infringe Kellytoy's copyrights in the Squishmallow

1 Designs, as well as any plates, molds, matrices, programs, or other articles by means
2 of which copies of the works embodied in the Squishmallow Designs may be
3 produced;

4 10. Enter an order, pursuant to 17 U.S.C § 503(b), requiring the destruction
5 of all copies of Defendants' products that infringe Kellytoy's copyright in the
6 Squishmallow Designs, as well as any plates, molds, matrices, programs, or other
7 articles by means of which copies of the works embodied in the Squishmallow
8 Designs may be produced;

9 11. That each Defendant provide Kellytoy in writing with the following
10 information relating to Defendants' goods marketed, advertised, offered for sale, or
11 sold under the Squishmallow Trade Dress or Squishmallow Designs:

12 (i) the name, address and telephone number of each and every United
13 States entity to whom Defendants have made available or otherwise
14 provided any such products; and
15 (ii) a full accounting as to the precise dollar amount of such products made
16 available or provided and the profits recognized by Defendants in
17 connection with such actions;

18 12. Direct Defendants to pay the costs of corrective advertising;

19 13. Direct Defendants to pay Plaintiffs' attorneys' fees and costs incurred
20 in initiating and prosecuting this action;

21 14. Direct Defendants to pay punitive damages and exemplary damages
22 according to proof;

23 15. That Kellytoy recover its actual damages, Kellytoy's lost profits, and
24 Defendant's profits arising from Defendants' conduct complained-of herein;

25 16. That the Court award enhanced profits and treble damages;

26 17. That Kellytoy be awarded statutory damages;

27 18. That Kellytoy be awarded interest, including pre-judgment
28 interest, on the foregoing sums;

19. That the Court direct such other actions as the Court may deem just and
proper to prevent the public from deriving the mistaken impression that any
products or services offered, advertised, or promoted by or on behalf of Defendants
are authorized by Kellytoy or related in any way to Kellytoy's products or services;
and

5 20. For such other and further relief as the Court may deem just and
7 proper.

Respectfully submitted,

Dated: April 10, 2018

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: /s/ Mark B. Mizrahi
MARK B. MIZRAHI
MAX N. WELLMAN
Attorneys for Plaintiffs
KELLYTOY (USA), INC. and
KELLYTOY WORLDWIDE, INC.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand and request a trial by jury of all issues raised that are triable by jury.

Respectfully submitted,

Dated: April 10, 2018

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

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